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IN THE

Supreme Court of the United States

KATHLEEN HAWK SAWYER, MICHAEL COOKSEY, AND DAVID RARDIN,

Cross-Petitioners,

v.

JAVAID IQBAL, ET AL.,

Cross-Respondents.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT JAVAID IQBAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

COUNTERSTATEMENT OF JURISDICTION 2

STATEMENT 3

REASONS FOR DENYING THE CROSS-PETITION 6

I. The Cross-Petition Has Not Been Timely Filed 8

II. The Second Circuit's Decision Is Fully In Accord With This Court's Section 1985 Precedent And With The Decisions Of Other Circuits 14

CONCLUSION 26

TABLE OF AUTHORITIES

CASES

Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955 (2007) 11, 23, 24
Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971)..... 3
Bolling v. Sharpe, 347 U.S. 497 (1954) 18
Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993) 20, 21
Federal Election Comm'n v. NRA Political Victory Fund, 513 U.S. 88 (1994) 3
Federer v. Gephardt, 363 F.3d 754 (8th Cir. 2004).. 21
Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366 (1979) 14, 20, 21
Griffin v. Breckenridge, 403 U.S. 88 (1971) 20, 21
Harrison v. KVAT Food Management, Inc., 766 F.2d 155 (4th Cir. 1985) 20
Johnson v. California, 543 U.S. 499 (2005) 19
Li v. Canarozzi, 1997 WL 40979 (S.D.N.Y. Feb. 3, 1997) 17
Missouri v. Jenkins, 495 U.S. 33 (1990)..... 10
Sherlock v. Montefiore Medical Center, 84 F.3d 522, 527 (2d Cir. 1996) 14, 20
Spencer v. Casavilla, 903 F.2d 171 (2d Cir. 1990)... 20
United Bhd. of Carpenters & Joiners v. Scott, 463 U.S. 825 (1983) 14, 20
United States v. Reliable Transfer Co., 421 U.S. 397 (1975) 10
Ward v. Connor, 657 F.2d 45 (4th Cir. 1981)..... 20

STATUTES AND RULES

42 U.S.C. § 1985 ..... passim
Fed. R. Civ. P. 12 4
Sup. Ct. Rule 12 ..... 2, 4, 9
Sup. Ct. Rule 13 ..... 3, 8

IN THE

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No. 07-1150

KATHLEEN HAWK SAWYER,
MICHAEL COOKSEY, AND DAVID RARDIN,
Cross-Petitioners,

v.

JAVAID IQBAL,
Cross Respondent.

On Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION

Should the Court grant certiorari in *Ashcroft v. Iqbal*, No. 07-1015, cross-petitioners conditionally ask this Court to address the following question: whether the Second Circuit properly permitted certain of respondent's claims to proceed under 42 U.S.C. § 1985(3), even as it dismissed certain claims that cross-petitioners believe involve the same rights at stake in respondent's Section 1985 claims. Even if the petition in No. 07-1015 is granted, the conditional cross-petition should be denied for several reasons, most prominently because it is in actuality not a cross-petition but simply an untimely filed petition for writ of certiorari. Putting aside this jurisdictional barrier, the cross-petition seeks error-correction of a

most limited kind because cross-petitioners' argument reduces to a complaint about the possibility of unresolved and unacknowledged tension in the Second Circuit's opinion. In fact, the tension suggested by cross-petitioners does not exist, and in any event is not independently cert-worthy. Nor do cross-petitioners identify any conflict between the circuits regarding the question presented, and their argument that the decision below conflicts with this Court's interpretation of Section 1985(3) ultimately fails. Indeed, cross-petitioners concede that the Second Circuit has consistently adhered to this Court's guidance regarding Section 1985(3). There thus are no good grounds for granting the cross-petition, and many sound reasons to deny it.

COUNTERSTATEMENT OF JURISDICTION

The court of appeals entered its opinion and judgment on June 14, 2007, and denied rehearing on September 18, 2007. Warden Dennis Hasty, petitioner in *Hasty v. Iqbal*, No. 07-827, filed a timely petition on December 17, 2007. Petitioners John D. Ashcroft and Robert Mueller requested and received extensions of time by which to file a petition for writ of certiorari, and filed their timely petition on February 6, 2008. Cross-petitioners never requested an extension of time to file a petition. Instead, they filed the instant conditional cross-petition within 30 days of the filing of the petition in *Ashcroft v. Iqbal*, No. 07-1015. Because cross-petitioners support the position of petitioners in Nos. 07-1015 and 07-827, they are bound by the same filing deadlines, such that their conditional cross-petition is untimely. Sup. Ct. Rule 12.6; *infra* Part I. Accordingly, this Court does not have jurisdiction over the cross-

petition. *E.g.*, *Federal Election Comm'n v. NRA Political Victory Fund*, 513 U.S. 88, 90-91 (1994); Sup. Ct. Rule 13.2.

STATEMENT

1. Beginning in January 2002, respondent Javaid Iqbal[1] was held for more than 150 days in a maximum security unit in Brooklyn, New York's Metropolitan Detention Center ("MDC") that was known as the "ADMAX SHU"—short for Administrative Maximum Special Housing Unit. He was held there because he was presumptively categorized as "of high interest" to the September 11th investigations, solely because of his race, religion, and national origin, and for no legitimate reason. App. 164a-165a, 172a-173a (Compl. ¶¶ 48-53, 96). While on the ADMAX SHU, Mr. Iqbal was subjected to solitary confinement, unnecessary and abusive strip searches, and beaten by correction officers, among other abusive conditions. *Id.* 166a, 170a-171a, 176a-177a, 181a-187a (Compl. ¶¶ 60, 63, 84, 87, 89, 113, 116-17, 120, 122, 137-148, 153-54, 158, 168, 171).

After he was deported, Mr. Iqbal subsequently brought this lawsuit, seeking compensation for the central role that cross-petitioners and other federal officials played in subjecting him to harsh conditions of confinement. Mr. Iqbal brought claims under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for violations of his First, Fourth, Fifth, Sixth, and Eighth Amendment rights, as well as various statutory claims.

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[1] Although Mr. Iqbal is denominated a cross-respondent, he will be referred to as "respondent" throughout this brief.

2. The complaint alleges that specific defendants crafted, directed, and implemented practices and procedures regarding the confinement of "high interest" detainees in the ADMAX SHU. Among these officers were cross-petitioners, Kathleen Hawk Sawyer, former Director of the Bureau of Prisons ("BOP"), Michael Cooksey, former Assistant Director for Correctional Programs of the BOP, and David Rardin, former Director of the Northeast Region of the BOP.

Each of the cross-petitioners took steps necessary to unlawfully confine Mr. Iqbal in the ADMAX SHU. On or about October 1, 2001, cross-petitioners Sawyer and Cooksey issued an order directing that September 11 detainees be held at BOP facilities under maximally restrictive conditions until cleared by the FBI. App. 168a (Compl. ¶¶ 70-71). Cross-petitioners approved the suspension for September 11 detainees of formally promulgated BOP regulations requiring individualized findings of a necessity for administrative segregation like that imposed on the ADMAX SHU. *Id.* 157a-158a, 166a-168a, 172a-173a (Compl. ¶¶ 14-16, 64-68, 95-97). Indeed, it was cross-petitioner Cooksey who had the final responsibility to approve respondent's release to the general population of the MDC. *Id.* 167a-168a (Compl. ¶ 68.). Finally, cross-petitioners knew of and agreed to establish this policy whereby detainees like respondent were confined in the ADMAX SHU for arbitrary reasons and solely because of race, religion, and national origin. *Id.* 172a-173a (Compl. ¶¶ 96–97).

3. Prior to engaging in discovery, in October 2004, several defendants and cross-petitioners filed motions to dismiss respondent's complaint. Among other arguments, cross-petitioners asserted that the complaint should be dismissed under Rule 12(b)(6)

on the ground of qualified immunity. The district court permitted claims to proceed against cross-petitioners both for violations of Section 1985(3) and for violations of respondent's procedural due process rights. The court noted that "the post-September 11 context" supported respondent's assertion of cross-petitioners' personal involvement, and that "some of the defendants, in disclaiming responsibility, suggest that other defendants (who also disclaim responsibility) were personally involved." *Id.* 116a-118a. Reasoning that Mr. Iqbal "should not be penalized for failing to assert more facts" given that the extent of defendants' respective "involvement is peculiarly within their own knowledge," *id.* 118a, the court concluded that the facts alleged in respondent's complaint were sufficient.[2] Eight defendants then noticed appeals to the Second Circuit Court of Appeals.

4. A panel of the Second Circuit affirmed the district court's opinion in large part. *Id.* 1a-70a. As to cross-petitioners, the appellate court found that respondent stated a claim for violation of his Fifth Amendment due process right, but that the right was not clearly established at the time of the alleged violations. *Id.* 31a-46a. However, the court of appeals found that respondent's Section 1985(3) claims survived against cross-petitioners. *Id.* 63a-65a. Cross-

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[2] The district court also found support for respondent's allegations in the Government's own investigation of the treatment of September 11th detainees at the MDC, citing portions of an April 2003 Report by the Office of Inspector General of the Department of Justice. App. 116a n.20. As the district court noted, the April 2003 report suggests that cross-petitioners were personally involved in "creating or implementing" the policies that led to respondent's confinement in the ADMAX SHU. *Id.* (citing to portions of investigation that implicated cross-petitioners Sawyer, Cooksey, and Rardin).

petitioners had argued that the Section 1985(3) claims should be dismissed for two related reasons: because Section 1985(3) did not apply to federal officials; and because even if it did apply to such officials, it was not "clearly established" at the time that Section 1985(3) applied to federal officials and therefore qualified immunity was available. (App. Br. for Cross-Petrs. Rardin, Sawyer, & Cooksey at 34-36).

The Court of Appeals decidedly rejected both of these arguments. App. 63a-65a. In so doing, the court made the following statement regarding the clearly established nature of the right at issue:

> [E]ven without a definitive ruling from this Court on the application of section 1985(3) to federal officials, federal officials could not reasonably have believed that it was legally permissible for them to conspire with other federal officials to deprive a person of equal protection of the laws, at least where the officials' conduct, alleged to have accomplished the discriminatory object of the conspiracy, would violate the *Equal Protection Clause*.

Id. 65a (emphasis added).

REASONS FOR DENYING THE CROSS-PETITION

The cross-petition suggests that this Court intervene to resolve what is an alleged internal tension within the Second Circuit's opinion: on the one hand, according to cross-petitioners, the court below affirmed the district court's refusal to dismiss certain claims under Section 1985(3) that alleged a conspiracy to discriminate against respondent by placing

him in "unnecessarily harsh conditions . . . without due process of law," App. 206a-208a (Compl. ¶¶ 247, 250); on the other hand, the Second Circuit found that respondent's Fifth Amendment procedural due process claim was barred by qualified immunity because, although respondent stated a claim for violation of due process, that right was not clearly established at the time of the alleged violation. Cross-petitioners argue that the Second Circuit's affirmance of the district court's Section 1985(3) claim therefore violates a fundamental rule about Section 1985(3): a plaintiff must identify an independent constitutionally-protected right that was violated by the conspiracy, because Section 1985(3) does not create any substantive rights on its own. On petitioner's account, because there is no viable procedural due process claim, there can be no viable claim for conspiracy to deprive respondent of due process.

To state the logic of the cross-petition is to identify one principal reason not to grant certiorari: it requests error-correction of a most limited kind. This becomes even more obvious when one realizes that cross-petitioners identify no relevant circuit split, and concede that the Second Circuit has consistently adhered to the very legal rule that cross-petitioners claim was violated by the decision below. Moreover, cross-petitioners' claim that the Second Circuit's decision is in conflict with this Court's decisions is incorrect. The decision below does not even address the legal rule that cross-petitioners seek to vindicate here because none of the arguments made in the cross-petition was ever presented to the Second Circuit. Moreover, as shown above, the Second Circuit clearly interpreted respondent's Section 1985(3) claims to be rooted in the Equal Protection Clause, not the Due Process Clause. App. 65a (referring to

clarity of law regarding discrimination that would violate Equal Protection Clause).

But aside from these issues of error correction and waiver, there is a significant jurisdictional barrier to the cross petition: the cross-petition is in actuality an untimely filed petition for writ of certiorari, because cross-petitioners do not in any way express interests contrary to that of any of the other petitions filed seeking review of the Second Circuit's decision, and their arguments are no different from those made by petitioner Hasty in No. 07-827 and petitioners Ashcroft and Mueller in No. 07-1015. Indeed, it is evident from proceedings in the district court that cross-petitioners only filed this cross-petition to obtain a stay of discovery in district court, not because they actually disagreed with any of the legal positions taken by petitioners in Nos. 07-1015 or 07-827 or because their interests were threatened by either of those petitions.

For these reasons, respondent respectfully requests that this Court dismiss the cross-petition for lack of jurisdiction, or in the alternative deny the cross-petition.

I. THE CROSS-PETITION HAS NOT BEEN TIMELY FILED

We begin with the jurisdictional barrier to the cross-petition. Supreme Court Rules 12 and 13 set forth the relevant timelines for seeking discretionary review on certiorari of a court of appeals' decision. Pursuant to Rule 13.1, a petition for writ of certiorari must be filed within 90 days of the decision below, or December 17, 2007 in this case. Cross-petitioners neither filed their cross-petition by this date, nor sought an extension of time. As such, their cross-

petition must be in conformity with Rule 12.5, which provides that "[n]o more than 30 days after a case has been placed on the docket, a respondent" must file a conditional cross-petition if it is to be considered timely. The question thus becomes whether the conditional cross-petition is timely, it must be determined whether cross-petitioners are "respondent[s]" entitled to file an otherwise untimely petition for writ of certiorari.

Cross-petitioners here should not be considered "respondent[s]" for purposes of having the right to file an otherwise untimely cross petition in *Ashcroft v. Iqbal*, No. 07-1015. Supreme Court Rule 12.6 states that "[a]ll parties other than the petitioner are considered respondents, *but any respondent who supports the position of a petitioner* shall meet the petitioner's time schedule for filing documents." Sup. Ct. R. 12.6 (emphasis added). That is, if cross-petitioners here are deemed to "support[] the position" of petitioners Ashcroft and Mueller, they are not entitled to file a conditional cross-petition under Rule 12.5 because they would have to meet the time requirements imposed for petitioners in No. 07-1015.

This basic framework is consistent with the rationale for permitting conditional cross-petitions: to protect the interests of the party who prevailed in large part below, but who did not prevail on every argument. This party might accept the lower court decision and therefore not file an initial petition for certiorari. However, once that party's adversary files a petition for certiorari, the party may reason that, if the Court exercises its certiorari jurisdiction to review those matters on which the party prevailed, there is no reason not to ask the Court to also review those matters on which the party did not prevail. *United States v. Reliable Transfer Co.*, 421 U.S. 397,

401 n.2 (1975) (purpose of cross-petition is to permit respondent to ask Court to "enlarge its rights"); *see also Missouri v. Jenkins*, 495 U.S. 33, 41 n.8 (1990) (respondent may not challenge a portion of the lower court's judgment without filing a cross-petition).

Where a party has overlapping interests with a petitioner, as cross-petitioners do with petitioners Ashcroft and Mueller, however, none of the objects of permitting the filing of a cross-petition is met. Here cross-petitioners' interests were unaffected when the petition in No. 07-1015 was filed, because the petition did not create the risk that the Court could deprive cross-petitioners of a favorable ruling below by granting the petition in No. 07-1015. This explains why the Court permits respondents to file cross-petitions after the deadline for filing a petition has passed—*except* where, as here, the respondent supports the position of the petitioner.

Applied here, there is no colorable argument that cross-petitioners take any position in conflict with the petition in No. 07-1015 (or the petition in *Hasty v. Iqbal*, No. 07-827, for that matter). Nor is there any argument that cross-petitioners are indifferent as to the arguments raised by petitioners. And any reasonable reading of the cross-petition leads inexorably to the conclusion that cross-petitioners support the position of petitioners Ashcroft, Mueller, and Hasty.[3] In the district court and on appeal, petitioners and cross-petitioners made nearly identical arguments for why respondent's complaint should be

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[3] Indeed, cross-petitioners here do not even go through the motions of listing petitioners Ashcroft and Mueller, the petitioners in 07-1015, as cross-respondents. Rather, they list respondent Javaid Iqbal as a cross-respondent even though Mr. Iqbal has not filed any petition in this Court.

dismissed.[4] And now, petitioners and cross-petitioners both argue that the Second Circuit erred in affirming the denials of their motions to dismiss, for similar reasons. Cross-petitioners argue, just like petitioners in Nos. 07-1015 and 07-827, that the Second Circuit misapplied this Court's decision in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007). Cross-Pet. 18-20. Cross-petitioners argue, just like the other petitioners, that the complaint's allegations regarding their personal involvement are "conclusory" and not sufficiently factual, and that the Second Circuit's decision undermines the qualified immunity defense. Cross-Pet. (i), 21-24. That cross-petitioners assert an additional argument not proffered by petitioners, namely that the Second Circuit's treatment of respondent's Section 1985(3) claim is in tension with its treatment of other claims, does nothing to save their petition, because this does not make cross-petitioners any less supportive of the positions advocated by petitioners.[5]

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[4] They all argued that they were entitled to qualified immunity for similar reasons, and that respondent's allegations were too "conclusory" to establish their personal involvement in the alleged constitutional violations. App. 11a-12a. To the extent there was any variance in their arguments, the cross-petition does not hinge on those differences. App. 15a (noting that cross-petitioner Cooksey, as opposed to other appellants, "explicitly urges us to adopt a heightened pleading standard in *Bivens* actions").

[5] It might also bear asking when this case was "placed on the docket" within the meaning of Rule 12.5. There are two possible answers: December 20, 2007, when the petition in *Hasty v. Iqbal*, No. 07-827, was placed on the docket; or February 6, 2008, when the petition in *Ashcroft v. Iqbal*, No. 07-1015, was placed on the docket. Both petitions seek review of the same decision below, which cross-petitioners also seek to review. And there is no indication that the cross-petition relates in any particular way to the petition in 07-1015 instead of 07-827. Thus,

That the cross-petition is in reality an untimely petition masquerading as a conditional cross-petition is confirmed by the circumstances of its filing. At a December 20, 2007 appearance before the magistrate judge supervising discovery, cross-petitioners indicated they had no intention of filing a petition for writ of certiorari because they interpreted the Second Circuit's decision to mean that no viable claims remained against each of them. (Tr. Of Dec. 20, 2007, Conference at 51.) In response to this argument, the magistrate judge directed cross-petitioners to either file a motion to dismiss the claims before the district court or answer the complaint and respond to outstanding discovery requests.

Pursuant to local rule, cross-petitioners then filed a pre-motion conference letter with the district court, indicating their intention to move to dismiss respondent's claims based on their interpretation of the Second Circuit's decision. (Jan. 16, 2008, Letter to District Judge (Dist. Ct. Docket No. 520)). The district court referred the motions to the magistrate judge, who held a premotion conference on February 20, 2008. At the conclusion of that conference, the Court set a deadline by which cross-petitioners had to file their motion to dismiss, and directed that regardless of whether the cross-petitioners filed a motion to dismiss, "any previously entered stay of discovery with respect to these defendants is lifted, and responses to plaintiffs' outstanding written discovery demands is due 3/24." (Docket Entry dated February 21, 2008).

Although the petition in No. 07-1015, the supposed object of the cross-petition, was filed on Febru-

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it is unclear why the time for filing this cross-petition would not begin running when 07-827 was placed on the docket.

ary 6, 2008, it was not until *after* the February 20 conference when cross-petitioners sought approval from the Department of Justice to have their attorneys compensated for the time spent on the certiorari petition. (March 21, 2008, Letter to Magistrate Judge at 4 (Dist. Ct. Docket No. 532)). Moreover, cross-petitioners never filed their motion to dismiss. All of this suggests quite powerfully that the purpose of filing the cross-petition was not to expand on a favorable ruling below that was threatened by the petition in this matter, but to avoid discovery in the district court.

If cross-petitioners are considered respondents for purposes of the petition in No. 07-1015, then in any case in which multiple parties appear on one side or another, they will be permitted to delay filing certiorari petitions whenever one of their co-defendants or co-plaintiffs files a petition. Not only is this inconsistent with the purposes of permitting conditional cross-petitions, but it also works to the substantial prejudice of a respondent such as Mr. Iqbal. In response to the original petition filed in this matter, Mr. Iqbal had the option of filing a conditional cross-petition to seek to expand favorable portions of the Second Circuit's decision, particularly if they related to the topics on which petitioners sought certiorari. However, in response to the cross-petition filed by cross-petitioners, Mr. Iqbal has no ability to file a conditional cross-petition, even though the cross-petition is the only document filed with this Court which implicates the one aspect of the Second Circuit's decision on which Mr. Iqbal did not prevail. Thus, if the instant petition is considered a timely filed cross-petition, cross-petitioners will have achieved a significant advantage at Mr. Iqbal's expense by not filing their petition until after their co-

defendants. For the foregoing reasons, respondent respectfully request that the Court dismiss the cross-petition as untimely.

II. THE SECOND CIRCUIT'S DECISION IS FULLY IN ACCORD WITH THIS COURT'S SECTION 1985 PRECEDENT AND WITH THE DECISIONS OF OTHER CIRCUITS

Should the Court find that the cross-petition was timely filed, and that certiorari should be granted in *Ashcroft v. Iqbal*, No. 07-1015, it should nonetheless deny the cross-petitioners' request for certiorari. The arguments made by cross-petitioners are ultimately error-correcting ones because they suggest the need to correct an alleged tension within the Second Circuit's opinion. And, because when correctly read, the Second Circuit's opinion is completely consistent, cross-petitioners' request for error-correction is not, under any standard, certworthy.

a. Cross-petitioners first claim that the Second Circuit's decision contravenes this Court's construction of Section 1985(3). But in so doing cross-petitioners misstate the import of the Second Circuit's decision. This Court has held, and the Second Circuit has recognized, that Section 1985(3) does not create a substantive cause of action, but "merely provides a remedy for violation of the rights it designates," rights which must exist independently of Section 1985. *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 372 (1979); *United Bhd. of Carpenters & Joiners v. Scott*, 463 U.S. 825, 833 (1983); *Sherlock v. Montefiore Medical Center*, 84 F.3d 522, 527 (2d Cir. 1996). And the protected right, as cross-petitioners correctly state, must be

protected from infringement by the named governmental or private defendant. Cross-Pet. 14. Up to this point respondent is in agreement with cross-petitioners.

The next several steps in cross-petitioners' analysis are the point of departure for respondent. First, cross-petitioners state that the district court identified the three protected rights at issue in respondent's Section 1985(3) claims, generally, as the right to procedural due process, the right to be free of unreasonable searches and seizures, and the right to engage in the free exercise of religion. Cross-Pet. 16 (*citing* App. 142a). Next, cross-petitioners state that the only claims pleaded against cross-petitioners that were at stake in the Second Circuit were the Section 1985(3) claims, which alleged a conspiracy to deprive respondent of his right to procedural due process. Cross-Pet. 16. Finally, cross-petitioners note that the Second Circuit held that respondent's Fifth Amendment due process claim was barred by qualified immunity.[6] *Id.* Cross-petitioners conclude that, if respondent's substantive Fifth Amendment claim was barred by qualified immunity, by extension, respondent's Section 1985(3) claim should not have survived. *Id.* The Second Circuit's contrary result, according to cross-petitioners, is inconsistent with this Court's requirement that Section 1985(3) plaintiffs "identify independent sources of actionable rights." *Id.* For several reasons, cross-petitioners' argument fails.

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[6] Notably, the Second Circuit held that respondent had alleged a violation of due process, but that his right to procedural due process was not clearly established at the time of the alleged violation. App. 31a-46a.

First, neither cross-petitioners, nor any other party, raised before the Second Circuit the issue of what "independent sources of actionable rights" are implicated by respondent's Section 1985(3) claims. The only arguments made below by cross-petitioners were that Section 1985(3) does not apply to federal officials; and that even if it did, it was not clearly established in 2001 that Section 1985(3) applies to federal officials. (App. Br. for Cross-Petrs. Rardin, Sawyer, & Cooksey at 34-36). There thus was no reason for the Second Circuit to address the issue raised here—and indeed the Second Circuit did not address it. Therefore, to the extent there is any tension in the Second Circuit's opinion, it is neither expressed nor acknowledged; it can only be found if one accepts the inferences from the opinion sought to be drawn by cross-petitioners. Nor did cross-petitioners seek rehearing or rehearing *en banc* regarding this alleged contradiction within the Second Circuit's own opinion, again depriving the Second Circuit of the opportunity to address the argument made here by cross-petitioners.[7]

This is significant because cross-petitioners acknowledge that the Second Circuit itself has applied correctly the legal principle cross-petitioners seek to vindicate. Cross-Pet. 14. Given that the Second Circuit did not even discuss the issue presented here, there is no reason to conclude that the decision below marks a departure from the Second Circuit's prior precedent. At best, then, cross-petitioners seek error correction of an implied conflict between the Second Circuit's decision in this case and its decisions in

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[7] And as already noted, cross-petitioners elected not to pursue a motion to dismiss in district court after remand from the Second Circuit.

past Section 1985(3) cases. This is an independent reason not to grant certiorari on the question presented by cross-petitioners.

b. The cross-petition also should be rejected because there is no conflict between the decision below and the requirement that a Section 1985(3) claim allege a violation of an independent substantive right.

We begin with the first step of cross-petitioners' analysis, their contention that the district court held that the Section 1985(3) claim that related to cross-petitioners was grounded in the same due process right that was the basis for respondent's Fifth Amendment claim. Cross-Pet. 16. This contention is necessary for cross-petitioners to sustain their argument, because they acknowledge that none of these issues was discussed in the Second Circuit's opinion. As an initial matter, there is no sound reason for binding the Second Circuit to particular language used by the district court, especially when that aspect of the district court's opinion was not implicated on appeal. Putting aside this objection, the district court never described the "independent source of actionable rights" of respondent's Section 1985(3) claim. If anything, all the district court held was that Section 1985(3) reaches "racially motivated conspiracies involving federal officers." App. 144a (internal quotation marks omitted). And the district court's citation to *Li v. Canarozzi*, No. 95 Civ. 0706, 1997 WL 40979 (S.D.N.Y. Feb. 3, 1997), confirms that the district court understood this case to be about the racially motivated conspiracy to mistreat respondent. *Id.* at *4 ("Section 1985(3) is a conspiracy statute; the predicate act it addresses is a viola-

tion of the Equal Protection Clause of the Fourteenth Amendment.").[8]

In this light, it is apparent that the "independent source of actionable rights" that is implicated by respondent's Section 1985(3) claim is his right to equal protection, a right explicitly protected by the text of Section 1985(3). If there were any doubt, respondent made it crystal clear in his filings below that this is one source of his right under Section 1985(3). (Respondent Iqbal's Br. on Appeal at 145-146 ("After all, defendants cannot claim a lack of fair notice that they were prohibited from engaging in the conduct prohibited by Section 1985(3) – discrimination against a protected class of individuals for the purpose of depriving them of the equal protection of the laws.")). The Second Circuit adopted this same view of respondent's Section 1985(3) claims, making clear that it considered the claims to be rooted in the Equal Protection Clause:

> [E]ven without a definitive ruling from this Court on the application of section 1985(3) to federal officials, federal officials could not reasonably have believed that it was legally permissible for them to conspire with other federal officials to deprive a person of equal protection of the laws, at least where the officials' conduct, alleged to have accomplished the discriminatory object of the conspiracy,

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[8] The Equal Protection Clause of the Fourteenth Amendment has been held to apply to federal officials, through the "reverse incorporation" doctrine. *See Bolling v. Sharpe*, 347 U.S. 497 (1954) (Fifth Amendment Due Process Clause incorporates equal protection principles of Fourteenth Amendment).

> would violate the *Equal Protection Clause*.

App. 65a (emphasis added).

In light of this, the Second Circuit's holding that respondent did not have a clearly established right to procedural due process at the time of the conduct alleged in the complaint has no bearing on the viability of his Section 1985(3) claim. Conspiring to injure respondent because of his race, religion, and national origin is a violation of Section 1985(3), and the constitution, without reference to whether respondent maintains an independent constitutional right to be free of the injury he suffered. In this case, for instance, even if respondent did not have an independent constitutional right to be free of segregated confinement in the MDC, he nonetheless had an independent constitutional right not to be segregated because of his race. *See, e.g., Johnson v. California*, 543 U.S. 499 (2005). Similarly, to intentionally deny Muslim, Arab, or South Asian inmates access to the hearings and process afforded by the Code of Federal Regulations would be unconstitutional, regardless of whether any independent procedural due process violation arose from such a deprivation.

Seen in this light, the Second Circuit's resolution of respondent's Section 1985(3) claim is perfectly consistent with the remainder of its decision. The court below held that it was clearly established that federal officials could not discriminate on the basis of race, religion, and national origin at the time of the conduct alleged in the complaint. App. 59a-60a. The court also found that respondent's Section 1985(3) claims are based on principles of equal protection. App. 65a. Thus, the viability of respondent's Section

1985(3) claims is buttressed, not undermined, by the Second Circuit's decision on qualified immunity.[9]

c. Cross-petitioners' position is misinformed in no small part because they rely on cases involving *private* individuals sued under Section 1985(3). *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993); *Scott*, 463 U.S. at 838; *Novotny*, 442 U.S. at 376 (1979); *Griffin v. Breckenridge*, 403 U.S. 88 (1971); *Sherlock*, 84 F.3d at 525-526; *Spencer v. Casavilla*, 903 F.2d 171, 174 (2d Cir. 1990); *Harrison v. KVAT Food Management, Inc.*, 766 F.2d 155 (4th Cir. 1985); *Ward v. Connor*, 657 F.2d 45, 48 (4th Cir. 1981).[10] For private individuals, of course, conspiracy to harm someone because of racial animus does not state a claim under Section 1985(3), because the Constitution does not protect citizens against private racial animus. This explains why this Court and lower courts have limited the reach of Section 1985(3) claims against private individuals to con-

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[9] Cross-petitioners might suggest that this analysis suggests that the Second Circuit's decision is inconsistent with the district court's decision granting cross-petitioners' motion to dismiss their equal protection claim. But the correctness of the district court's ruling on the equal protection claims against cross-petitioners was not before the Second Circuit, because it was not an appealable final decision. If anything, the tension between the two outcomes suggests that the district court was wrong to dismiss respondent's equal protection claims against cross-petitioners, but this is a matter that may be taken up by respondent on motion for reconsideration in the district court or on appeal after a final order has been entered in the instant case.

[10] One exception, *Dixon v. City of Lawton*, 898 F.2d 1443 (10th Cir. 1990), is inapposite. *Dixon* involved a review of a jury verdict, and found that the plaintiff had failed to submit any evidence of discriminatory animus.

spiracies motivated by animus that target a right explicitly protected against private action by the constitution. *Bray*, 506 U.S. at 267-68 (stating requirement for proving a *private conspiracy* under Section 1985(3)). To date, only two such rights have been identified as protected against private action by Section 1985(3): the right to interstate travel, and the right to be free of slavery or indentured servitude. *Id.* at 274 (right to travel); *Griffin*, 403 U.S. at 105 (badges and incidents of slavery).

But no Supreme Court case has addressed the reach of Section 1985(3) in terms of what "independent" federal right may be protected against infringement when the defendant is a government actor rather than a private citizen. The logic of Supreme Court cases and lower court cases interpreting Section 1985(3) suggests, however, that an animus-based conspiracy to violate a plaintiff's equal protection rights is actionable under the statute. For instance, in *Griffin*, in addressing the scope of Section 1985(3) with regard to private conspiracies, the Court noted that the language of the statute is "similar to that of § 1 of the Fourteenth Amendment," and explicitly linked that language to a common understanding of "what can constitute an equal protection deprivation" when the offender is a government actor. 403 U.S. at 96-97. Nonetheless, *Griffin* established that Section 1985(3) targets all deprivations of equal protection, "whatever their source." *Id.* at 97. And *Novotny* confirmed that Section 1985(3) provides a remedy "when some otherwise defined federal right—to *equal protection of the laws* or equal privileges and immunities under the laws—is breached by a conspiracy in the manner defined by the section." 442 U.S. at 376 (emphasis added). And in *Federer v. Gephardt*, 363 F.3d 754 (8th Cir. 2004), the Court

made clear that a claim could be actionable under Section 1985(3) when alleged against government actors, but not actionable when alleged against private actors, simply because of the scope of constitutional rights that run against government officials. *Id.* at 759 (dismissing First Amendment conspiracy claims because plaintiff had not shown that defendants acted under color of law and because the First Amendment does not run against private individuals). Thus, an animus-driven conspiracy by cross-petitioners to deprive respondent of his rights to equal protection is within the ambit of Section 1985(3).

Cross-petitioners might argue that requiring some class-based discriminatory animus is essentially the same as finding a violation of the Equal Protection Clause, and that allowing Section 1985(3) claims for conspiracies to violate equal protection would conflate two separate elements of the statutory claim. There are two principal responses. First, animus alone does not establish an Equal Protection Clause violation, and animus is also not necessary to establishing an Equal Protection Clause violation. Therefore, while there may be circumstances in which the evidence of animus would be the same as the evidence used to establish an "independently violated right," that will not always be the case. Second, Section 1985(3) has always been interpreted to include racially motivated conspiracies at the center of the conduct it regulates; it would therefore be strange remove from the heartland of Section 1985(3) a claim based on equal protection that most resonates with racially motivated conspiracies.

d. Cross-petitioners' remaining arguments in support of certiorari are poorly developed and not

compelling. Cross-petitioners suggest that the district court did not address the question of whether a constitutional right had been alleged or whether the right had been clearly established because the court addressed the substance of the right in the context of respondent's direct claims for violations of particular constitutional rights. Cross-Pet. 17. In fact, however, the district court addressed the arguments that cross-petitioners raised – that is the reason the district court focused on whether Section 1985(3) applied to federal officials and also whether respondent had sufficiently alleged the personal involvement of certain defendants. Cross-Pet. 17 n.6 (*see, e.g.*, Mem. Of Law In Support of Cooksey's Mot. To Dismiss at 19 (arguing only that Section 1985(3) does not apply to federal officials)).

Cross-petitioners also claim that the Second Circuit's resolution is inconsistent with *Bell Atlantic* because the allegations do not rise to the level of "plausibility." Cross-Pet. 19. The problem with this argument, other than that it again sounds in error-correction, is that cross-petitioners never raised below the issue of the adequacy of respondent's Section 1985(3) pleadings. The only arguments raised by cross-petitioners were that the statute did not apply to federal officials, and that, even if it did, its application to federal officials was not clearly established. (App. Br. for Cross-Petrs. Rardin, Sawyer, & Cooksey at 34-36). Therefore, cross-petitioners have waived any argument based on the sufficiency of respondent's pleadings.

In any event, respondent has alleged that cross-petitioners agreed to subject him to harsher conditions of confinement because of his race, religion, and national origin. And respondent has alleged the concrete steps that cross-petitioners took in this direc-

tion. On or about October 1, 2001, cross-petitioners Sawyer and Cooksey issued an order directing that September 11 detainees be held at BOP facilities under maximally restrictive conditions until cleared by the FBI. App. 168a (Compl. ¶¶ 70-71). Cross-petitioners approved the suspension for September 11 detainees of formally promulgated BOP regulations requiring individualized findings of a necessity for administrative segregation like that imposed on the ADMAX SHU. App. 157a-158a, 166a-168a, 172a-173a (Compl. ¶¶ 14-16, 64-68, 95-97). Indeed, it was cross-petitioner Cooksey who had the final responsibility to approve respondent's release to the general population of the MDC. App. 167a-168a (Compl. ¶ 68.). And cross-petitioners knew of and agreed to establish this policy whereby detainees like respondent were confined in the ADMAX SHU for arbitrary reasons and solely because of race, religion, and national origin. App. 172a-173a (Compl. ¶¶ 96–97). These allegations suffice under *Bell Atlantic*.

The remainder of cross-petitioners' arguments regarding sufficiency of the pleadings rests on alleged inconsistencies between the Second Circuit's resolution of respondent's Section 1985(3) claims and the district court's resolution of respondent's other claims against cross-petitioners. Cross-Pet. 19-20. But this is not an argument in favor of certiorari; it only suggests that the district court's resolution of those matters, which were not before the Second Circuit, will ultimately be reversed by it.

Nor is there any evidence that the Second Circuit undermined petitioner's claims to qualified immunity. Cross -petitioners' argument in this regard rests upon the same assumption that informs the rest of their cross-petition: that the Second Circuit's Section 1985(3) ruling is incompatible with its hold-

ing that respondent's due process right was not clearly established. Cross-Pet. 22. As shown above, however, the inference cross-petitioners seek to draw from the Second Circuit's opinion is unsupported. Cross-petitioners cannot claim that the Second Circuit's resolution of respondent's equal protection claim is in conflict with its resolution of respondent's Section 1985(3) claim.

In short, cross-petitioners' attempt to suggest conflict between the Second Circuit's decision and this Court's decisions notwithstanding, the cross-petition boils down to a contention that the Second Circuit's resolution of respondent's due process claim is inconsistent with its resolution of his Section 1985(3) claim. This is not an independently certworthy question and as demonstrated above, is based on a fundamental misreading of the Second Circuit's opinion.

CONCLUSION

For the foregoing reasons, the Court should dismiss the cross-petition for certiorari as untimely, or, in the alternative, deny the cross-petition.

Respectfully submitted,

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